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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 510

TEXAS CARBONATE COMPANY, PETITIONER

v.

R. L. PHINNEY, DISTRICT DIRECTOR OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The district court wrote no opinion, and its findings of fact and conclusions of law (R. 122–133) are unreported. The opinion of the court of appeals (Pet. 17–23) is reported at 307 F. 2d 289.

JURISDICTION

The judgment of the court of appeals was entered on August 7, 1962. (Pet. 15.) The petition for a writ of certiorari was filed on October 13, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the district court's finding that the taxpayer's vice-president and salesman was an employee under the Federal Insurance Contributions Act and the Federal Unemployment Tax Act is supported by the record.

STATUTES AND REGULATIONS INVOLVED

The pertinent portions of Sections 1410, 1426, 1600, and 1607 of the Internal Revenue Code of 1939, and of Section 403.204 of Treasury Regulations 107 and of Section 408.204 of Treasury Regulations 128 are set forth in the Appendix, *infra*, pp. 9–13.

STATEMENT

Taxpayer, a corporation engaged in the mining and processing of products from a Texas limestone plant, was organized in early 1939. Its stockholders are Melvin, Luther, and Herbert Miller, and Robert H. Rice, each of whom owns 25 per cent of its stock. During the years in question, 1953 and 1954, these four stockholders were the taxpayer's officers and its directors. (R. 124, 129–130.)

At the first stockholders' meeting Luther was appointed to taxpayer's board of directors. Shortly after taxpayer's incorporation, Luther assumed, pursuant to a directors' resolution, the duty of selling and marketing the company's products for a commission of fifty cents per ton; the resolution provided, in effect, that Luther was to bear his own expenses. Luther's compensation has always been on such a com-

mission basis. In 1941 and 1943, Luther was appointed general manager and then vice-president of the company, holding the latter office during the years involved here. (R. 124, 130, 131–132.)

Luther has been almost exclusively responsible for selling taxpayer's products, and his business abilities are largely responsible for its financial success. Since 1939, he has undertaken and performed numerous other tasks normally performed by an officer or owner of a closely held corporation, in addition to being the taxpayer's salesman. (R. 124, 125.)

Taxpayer did not include Luther as an employee in determining its liability and paying the tax under the Federal Insurance Contributions Act (F.I.C.A.) and the Federal Unemployment Tax Act (F.U.T.A.) for the years under consideration. The Commissioner of Internal Revenue assessed additional F.I.C.A. and F.U.T.A. taxes and interest for 1953 and 1954 based on his determination that Luther was an employee of the taxpayer for those periods. The taxpayer paid the additional tax and interest, and filed timely claims for refund. The claims were rejected and taxpayer brought suit below to recover those amounts. (R. 123–124.)

The district court found that Luther was an employee of the taxpayer under the statutory definition of that term, and entered judgment for the District Director. (R. 127–128.) The court of appeals affirmed that judgment. (Pet. 15–23.)

ARGUMENT

This case, involving $432 in taxes, is of no general importance. It decides only that a particular corporate officer, in light of his particular responsibilities, was an employee within the statutory definition. Both courts below were in agreement, and contrary to taxpayer's assertions, the decision of the court of appeals is not in conflict with any other case. There is no warrant for further review.

1. Section 1410 and Section 1600 of the Internal Revenue Code of 1939 (Appendix, *infra*, pp. 9, 10), levy excise taxes under the Federal Insurance Contributions Act (F.I.C.A.) and the Federal Unemployment Tax Act (F.U.T.A.), respectively, on the wages paid employees. Section 1426 and Section 1607 (Appendix, *infra*, pp. 9, 10–11) define the term "employee" to include an officer of a corporation, and any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee. A corporate officer is not *per se* an employee, but will be considered such if the usual tests of the employer-employee relationship are met, *i.e.*, if the officer actually performs services for and receives compensation from the corporation, and is subject to corporate control. The reason officers were specifically referred to in the statutory definition was to foreclose the contention, which had previously been raised in connection with State social legislation, that a corporate officer was *ipso facto* excluded from the category of "employee." *Deecy Products Co.* v. *Welch*,

124 F. 2d 592 (C.A. 1); *United States* v. *Griswold*, 124 F. 2d 599 (C.A. 1); *Independent Petroleum Corp.* v. *Fly*, 141 F. 2d 189 (C.A. 5); *United States* v. *Bernstein*, 179 F. 2d 105 (C.A. 4); *National Wooden Box Ass'n* v. *United States*, 59 Supp. 118 (C. Cls.); see *United States* v. *Aberdeen Aerie No. 24*, 148 F. 2d 655, 658 (C.A. 9).[1]

The issue whether Luther Miller was an employee under the foregoing principles is one of fact. *United States* v. *Thorson*, 282 F. 2d 157, 163–164 (C.A. 1). As the court of appeals correctly stated (Pet. 21), its function on appeal was to determine whether there was substantial evidence to support the trial court's finding that Luther was taxpayer's employee. Rule 52(a), Federal Rules Civil Procedure; *Commissioner* v. *Duberstein*, 363 U.S. 278, 291. A brief review of the evidence demonstrates that it properly affirmed that finding.

Since 1939 and during the years in question, 1953 and 1954, Luther was taxpayer's principal salesman. (R. 124–126.) During 1953 and 1954 and for some time prior thereto he was taxpayer's vice-president. (R. 124). In selling, he acted in his capacity as an officer, distributing taxpayer's business cards which carried his name and title as vice-president (R. 43–45, 70–72), and generally creating the impression that he was a corporate officer and not an independent con-

[1] *Nicholas* v *Richlow Mfg. Co.*, 126 F. 2d 16 (C.A. 10), is to the contrary, holding that an officer of a corporation is *per se* an employee, whether or not he renders any services. In Mim. 5967, 1946–1 Cum. Bull. 255, the Internal Revenue Service abandoned the *per se* doctrine and accepted the definition stated above.

tractor (R. 78–80). Luther sold for no other company or person, and sold only taxpayer's products. He employed no one (such as a secretary or salesman) and the only asset of his own that he used in selling was his automobile. (R. 41–45.)

In addition to selling, Luther performed many other services for taxpayer, such as collecting delinquent accounts (R. 39–49, 78), writing advertisements (R. 40), and signing nearly all the taxpayer's income tax returns, and occasionally, employees' salary checks (R. 35–36). Luther also investigated new products and new markets on taxpayer's behalf (R. 31–32, 103–104); and shared executive responsibilities with his brother, Herbert, the manager of taxpayer's plant (R. 31, 59, 84–86).[2] Plainly, the facts relating to Luther's sales and other services provide adequate support for the district court's finding that he was an employee and not an independent contractor.

2. The taxpayer advances several grounds (Pet. 2, 5–11) for issuing the writ, none of which are valid. It principally contends (Pet. 5–10) that the district court erred in not finding that Luther was free from control in working for taxpayer and that he was therefore an independent contractor. This contention ignores the evidence showing that Luther was responsible to, and reported to, taxpayer's board of

[2] Luther's commission clearly compensated him for these services, for all the other officers (including the titular president) were compensated (R. 105–107) and another employee was paid by commission for both selling and non-selling services (R. 93–94). See *Deecy Products Co.* v. *Welch*, *supra*.

directors.[3] Furthermore, taxpayer fails to recognize that the factor of control is relatively unimportant in determining whether a corporate officer and shareholder is an employee, since such a person is characteristically immune from detailed control by virtue of his superior position. Yet, as we have shown, corporate officers were specifically included within the definition of employee. The critical test is whether the officer actually renders services to the corporation (*Independent Petroleum Corp.* v. *Fly, supra*), and the evidence leaves no doubt that Luther's services were important and substantial.

Taxpayer also alleges (Pet. 2), without explanation, that the decision below is in conflict with *United States* v. *Thorson*, 282 F. 2d 157 (C.A. 1), and *Zipser* v. *Ewing*, 197 F. 2d 728 (C.A. 2). In each of those cases, the court of appeals upheld the district court's finding that the person in question, who was neither an officer of the company nor subject to its

[3] In 1944 taxpayer's board of directors instructed Luther to take steps to effectuate a price increase authorized by it. (R. 48, 101.) In 1952, Luther and his brother Herbert were made responsible for investigating a connection for the taxpayer to the Lower Colorado River Authority's electric lines and were directed to investigate further whether the company should undertake to make a new product. (R. 34–35, 102–104.) Luther was authorized to go to Minneapolis at taxpayer's expense to investigate the sale of its products to the flour mills located there. (R. 104). In 1954, Luther and Herbert were authorized by the board to pay such dividends as profits permitted. (R. 107–108.) Luther also testified that he reported to the board of directors (R. 103–104.) Both he and Herbert testified that they considered themselves "partners," consulting one another with respect to taxpayer's business. (R. 33, 92.)

control, was an independent contractor rather than an employee. Each case turned upon its own particular facts and is in no way inconsistent with the case at bar.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1962.

APPENDIX

Internal Revenue Code of 1939 (26 U.S.C., 1952 ed.):

SEC. 1410. RATE OF TAX.

In addition to other taxes, every employer shall pay an excise tax, with respect to having individuals in his employ, equal to the following percentages of the wages (as defined in section 1426 (a)) paid by him after December 31, 1936, with respect to employment (as defined in section 1426 (b)) after such date:

* * * * *

SEC. 1426. DEFINITIONS.

When used in this subchapter—

(a) *Wages.*—The term "wages" means all remuneration for employment, including the cash value of all remuneration paid in any medium other than cash; * * *

* * * * *

(b) [as amended by Sec. 204(a), Social Security Act Amendments of 1950, c. 809, 64 Stat. 477] *Employment.*—The term "employment" means any service * * * of whatever nature, performed * * * (A) by an employee for the person employing him * * * (i) within the United States * * *; except that * * *

* * * * *

(d) [as amended by Sec. 205(a), Social Security Act Amendments of 1950, *supra*] *Employee.*—The term "employee" means—

(1) any officer of a corporation; or

(2) any individual who, under the usual common law rules applicable in determin-

ing the employer-employee relationship, has the status of an employee; or

(3) any individual (other than an individual who is an employee under paragraph (1) or (2) of this subsection) who performs services for remuneration for any person—

* * * * * *

SEC. 1600 [as amended by Sec. 608, Social Security Act Amendments of 1939, c. 666, 53 Stat. 1360] RATE OF TAX.

Every employer (as defined in section 1607 (a)) shall pay for the calendar year 1939 and for each calendar year thereafter an excise tax, with respect to having individuals in his employ, equal to 3 per centum of the total wages (as defined in section 1607(b)) paid by him during the calendar year with respect to employment (as defined in section 1607(c)) after December 31, 1938.

SEC. 1607. DEFINITIONS.

When used in this subchapter—

(a) [as amended by Sec. 614, Social Security Act Amendments of 1939, *supra*] *Employer.*—The term "employer" does not include any person unless on each of some twenty days during the taxable year, each day being in a different calendar week, the total number of individuals who were employed by him in employment for some portion of the day (whether or not at the same moment of time) was eight or more.

(b) [as amended by Sec. 209(a), Social Security Act Amendments of 1950, *supra*] *Wages.*—The term "wages" means all remuneration for employment, including the cash value of all remuneration paid in any medium other than cash; except that such term shall not include—

* * * * * *

(c) [as amended by Sec. 302, Social Security Act Amendments of 1946, c. 951, 60 Stat. 978] *Employment.*—The term "employment" means any service * * * of whatever nature, performed after June 30, 1946, by an employee for the person employing him, irrespective of the citizenship or residence of either, (A) within the United States, * * * except—

* * * * *

(i) [as amended by Sec. 614, Social Security Act Amendments of 1939, *supra*, and Joint Resolution of June 14, 1948, c. 468, 62 Stat. 438] *Employee.*—The term "employee" includes an officer of a corporation, but such term does not include (1) any individual who, under the usual common-law rules applicable in determining the employer-employee relationship, has the status of an independent contractor or (2) any individual (except an officer of a corporation) who is not an employee under such common-law rules.

* * * * *

Treasury Regulations 107 (1939 Code):

SEC. 403.204 [as amended by T. D. 5905, 1952–1 Cum. Bull. 173] *Who are employees.*—Every individual is an employee if the relationship between him and the person for whom he performs services is the legal relationship of employer and employee. (The word "employer" as used in this section only, notwithstanding the provisions of Sec. 403.201(a), includes a person who employs one or more employees.)

* * * * *

If the relationship of employer and employee exists, the designation or description of the relationship by the parties as anything other than that of employer and employee is immaterial. Thus, if such relationship exists, it is of no consequence that the employee is designated as

a partner, coadventurer, agent, or independent contractor.

The measurement, method, or designation of compensation is also immaterial, if the relationship of employer and employees in fact exists.

All classes or grades of employees are included within the relationship of employer and employee. Thus, superintendents, managers, and other superior employees are employees. Generally, an officer of a corporation is an employee of the corporation. However, an officer of a corporation who as such does not perform any services or performs only minor services and who neither receives nor is entitled to receive, directly or indirectly, any remuneration is not considered to be an employee of the corporation. A director of a corporation in his capacity as such is not an employee of the corporation.

* * * * *

Treasury Regulations 128 (1939 Code):

SEC. 408.204. *Who are employees*—(a) *In general.* The statutory definition of the term "employee", applicable with respect to services performed on or after January 1, 1951, contains three separate and independent tests for determining who are employees. Paragraphs (b), (c), and (d) of this section relate to the respective tests. Paragraph (b) relates to the test for determining whether an officer of a corporation is an employee of the corporation. Paragraph (c) relates to the test for determining whether an individual is an employee under the usual common law rules. Paragraph (d) of this section relates to the test for determining which individuals in certain occupational groups who are not employees under the usual common law rules are included as employees. If an individual is an employee under any one of the tests, he is to be considered an employee

for purposes of the regulations in this part whether or not he is an employee under any of the other tests.

If the relationship of employer and employee exists, the designation or description of the relationship by the parties as anything other than that of employer and employee is immaterial. Thus, if such relationship exists, it is of no consequence that the employee is designated as a partner, coadventurer, agent, independent contractor, or the like.

All classes or grades of employees are included within the relationship of employer and employee. Thus, superintendents, managers, and other superior employees are employees.

Although an individual may be an employee under this section, his services may be of such a nature, or performed under such circumstances, as not to constitute employment within the meaning of the Act (see section 408.203).

(b) *Corporate officers.* Generally, an officer of a corporation is an employee of the corporation. However, an officer of a corporation who as such does not perform any services or performs only minor services and who neither receives nor is entitled to receive, directly or indirectly, any remuneration is not considered to be an employee of the corporation. A director of a corporation in his capacity as such is not an employee of the corporation.

* * * * *

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